

DEPARTMENT OF STATE

Memorandum of Conversation

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DATE: November 21, 1951

SUBJECT: Addition to FCN Treaties of Provision on Government-owned Patents.

PARTICIPANTS: BP - Messrs. Dixon and Rusch
L/E - Mr. Metzger
CP - Mr. Walker

COPIES TO: BP - Messrs. Dixon and Rusch
L/E - Mr. Metzger
EDT - Mr. Vernon
E - Mr. Schaetzel

DEPARTMENT OF STATE A/CDC/MR	
REVIEWED BY <u>ACDell</u>	DATE <u>7-30-82</u>
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611.944/11-233
Mr. Dixon's staff had proposed that there be added to the Department's standard draft FCN treaty, as a basis for future negotiations including that with Japan, a rule on government-owned patents. A suggested draft provision, as simplified and adjusted to fit into the framework of an FCN treaty, was as follows:

"Each Party agrees to make generally available without restriction to nationals of the other Party any patents that the Government of such Party may acquire in the territory of such other Party. Any royalties charged shall be reasonable."

611.944/11-2151
CS/H
Mr. Metzger, in a preliminary review of the proposal, had raised certain objections: (1) The problem had already proved difficult to negotiate about, and it was highly improbable that the provision would be negotiable in an FCN treaty with the countries (notably, Britain) where it was deemed most desired and needed. (2) The problem country at the moment is Great Britain, with whom there is little immediate prospect of negotiating an FCN treaty anyhow. (3) He was not convinced that in principle the licensing of patents ought to be made dependent upon who happens to own them. (4) He did not believe the FCN treaty should properly concern itself with the matter; the problem involved was of a special character that required treatment on its own merits.

Mr. Dixon

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Mr. Dixon opened the discussion by recapitulating and elaborating the reasons why his staff thought the provision should be adopted. He said that the objective sought represented a settled policy of the U. S. Government, and thought that it should be forwarded by whatever suitable means are at hand. Progress in achieving international acceptance of the principle of free licensing of government patents has been slow; nor has Congress yet given adequate support to a program of promoting such acceptance. He questioned whether the provision was any less properly includable in the FCN treaty than, for example, the anti-cartel provision. The negotiation of the provision would have educational as well as substantive value. There has already been a problem over British jet patents, and with increase of socialization abroad the problem of government patents could grow large and widespread in the future.

Mr. Metzger further questioned the justifiability of attempting the provision in the FCN treaties; he did not think, on analysis, that the British jet case lent support to including the provision as proposed. Mr. Walker outlined the general attitude of the Treaty Branch as follows. While there had been a policy of trying to make the FCN treaty serve as many U. S. interests as practicable, and consequently quite a number of new provisions had been added over the past few years, the presumption (albeit a rebuttable one) was against taking on further new matter. There is a constant stream of new proposals designed to correct this, that or the other special evil; and it is necessary to maintain guard lest the treaty become overloaded to the point of rendering it even less negotiable than it already is and of frustrating its major design and purpose. The current standard draft already has been vastly expanded and tightened, as compared with the traditional FCN treaty; and we think the draft is now burdened close to the breaking point. Mr. Metzger remarked that in his opinion the draft was already overloaded. The U. S. has virtually no bargaining power in an FCN negotiation; the U. S. gets all the best of it and offers little in return. Thus the FCN treaty is hardly the device through which a foreign government can be induced to give up the income it gets or hopes to get from the patents it owns when the U. S. has no quid pro quo to trade with. Effective ways and means for promoting government patent policy are therefore to be searched for elsewhere - perhaps in legislation which would provide the basis for some kind of reciprocity program wherein the U. S. would have a strong bargaining position. The treaty does not lend itself well to being used as a vehicle for activating Congressional support of the policy.

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As to possible analogy between the instant proposal and the standard-draft cartel provision, there are two material differences. First, the basic principles contained in the cartel provision had been worked out and given international blessing in the ITO Convention. One test of the includability of non-traditional material in an FCN treaty is whether it has some background of international approval. Secondly, the phrasing of the cartel provision is such as to make it difficult for any government to go on record as rejecting it. Nothing is gained by involving the treaty in peripheral controversies which the U. S. can't expect to win.

Mr. Dixon suggested he was cognizant of the probable difficulty of persuading such countries as Britain to agree to the instant proposal, but he thought there were undoubtedly many other countries which would go along with the U. S. view. He accordingly raised the possibility of adopting the following course: - Insert the provision in the Department's standard draft, get it accepted during negotiation by whatever countries are amenable, but withdraw it readily wherever serious resistance develops. This course, however, would be objectionable on several grounds. There would seem to be little utility in getting the provision only or mainly with countries which were not technically advanced or conspicuously invention-productive. To the contrary, it would hardly be advantageous for the U. S., through undertaking firm, and in effect one-sided, commitments with such countries as Libya, Paraguay, Pakistan, to give up its future freedom of action. The Department would be open to undesirable criticism if the provision appeared in treaties with such countries, where it could be regarded as a give-away, and was then missing from treaties signed with important technology-proficient countries. Finally, it has not generally been considered good practice to use the standard draft as a trial-ballon for provisions that the Department does not fully try and hope to get with everybody.

In summary, it did not appear that on balance the reasons for including the provision were sufficient to overcome the presumption against.

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EDT:CP:HWalker:jn
November 27, 1951

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